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IN THE

Supreme Court of the United States

October Term, 1970
No. 55

WINTON M. BLOUNT, POSTMASTER GENERAL OF THE UNITED STATES, and EVERETT T. CARPENTER, POSTMASTER OF THE CITY OF LOS ANGELES, STATE OF CALIFORNIA,

Appellants,

vs.

TONY RIZZI, dba THE MAIL BOX,

Appellee.

On Appeal From the United States District Court for the Central District of California.

BRIEF FOR THE APPELLEE.

Question Presented.

Whether 39 U.S.C. §4006, on its face and as construed and applied, violates the free speech and press, due process, equal protection, and jury provisions of the First, Fifth, Sixth and Seventh Amendments.

Statement.

The administrative proceedings were initiated on November 1, 1968, by the filing of a complaint signed by an Assistant General Counsel, Mailability Division, Post Office Department. (Brief for Appellants, Appendix, pp. 47-48). The complaint alleged that the said Assistant General Counsel had "probable cause to be-

lieve" that the appellee was conducting through the mails an enterprise in violation of 39 U.S.C. §4006. In support of that belief, the said Assistant General Counsel alleged, in the language of the statute, that appellee was obtaining remittances of money through the mails for "obscene" magazines and giving information where such matter could be obtained. Attached to the complaint were copies of the circulars allegedly giving such information. The alleged "obscene" publications were: "Me", "Gigi", "Susy", "Match", "Bunny", "Golden Girls" and "Girl Friend".

On November 18, 1968, the appellee filed its answer to the foregoing complaint. The general allegations of the complaint were denied, and appellee concurrently moved to dismiss the complaint upon the grounds that the complaint failed to state a violation of the statute 39 U.S.C. §4006, that the proceedings violated appellee's rights under the First and Fifth Amendments, and that the seven magazines against which the complaint was brought were not obscene and were entitled to constitutional protection under the First Amendment and the interpretative decisions of the Court. On November 22, 1968, the complainant filed its reply and urged the denial of appellee's motion to dismiss and requested an order striking portions of appellee's pleading. On November 26, 1968, the Judicial Officer denied appellee's motion to dismiss and the complainant's cross motion to strike. The Judicial Officer ruled that Postal Manual §821.331(b) deprived him of the authority "to determine the constitutionality of statutes". (*Ibid.*, pp. 45-46).

The administrative hearing began on December 3, 1968, and was concluded on December 5, 1968. The

Judicial Officer reserved decision pending submission of proposed findings of fact and memorandum of law by the parties. It was provided that such papers were to be filed within five days of the delivery of a copy of the transcript of the hearing to counsel for the Post Office. The final volume of the reporter's transcript was delivered to counsel for the Post Office December 18, 1968. The proposed findings of fact, proposed conclusions of law, and memorandum of law were filed by the Post Office Department on December 23, 1968. Appellee's papers were filed on December 28, 1968. (*Ibid.*, p. 46).

It should be noted that the postal inspector who testified at the administrative hearing stated that "he simply sent the Respondent one of the latter's own printed order forms and the required money and was sent the Magazines in return". (*Ibid.*, p. 53). The Judicial Officer described the dominant theme of the magazines, taken as a whole, as "largely photographs of nude or semi-nude women with legs akimbo and uncovered pubes presented to the camera". (*Ibid.*, p. 55). Federal and state rulings holding comparable material to be entitled to constitutional protection were all dismissed by the Judicial Officer as not "binding". (*Ibid.*, pp. 58-60). The conclusion of the Judicial Officer was that the magazines were "obscene, and therefore do not constitute constitutionally protected expression" (*Ibid.*, p. 62); that appellee was attempting to obtain remittances of money through the mail for the seven magazines so found to be obscene; that appellee was depositing in the mail information as to where, how, and from whom the addressee may obtain magazines which are obscene; and that such

activities constituted a violation of the provisions of 39 U.S.C. §4006.

On December 31, 1968, the Judicial Officer rendered his departmental decision, as aforestated, and an order issued from the Judicial Officer to the Postmaster in North Hollywood, California, directing him to hold all mail, whether registered or not, which should arrive at his office directed to appellee, except for so much as could be identified on the face of the wrapper as not relating "to the unlawful activity". The California Postmaster was directed to hold all mail not so identified for 24 hours after its receipt, during which time appellee was to have the right to examine the mail so held "at a reasonable time" in the presence of the Postmaster or an employee designated by him, and appellee was to receive such mail as was not connected with the unlawful activity. The California Postmaster was also directed to write plainly or stamp the word "Unlawful" upon the outside of all the mail returned to the sender. Where there was nothing to identify the sender of such mail, it was to be sent to the appropriate dead letter branch. (*Ibid.*, pp. 65-66). Some year and one-half later, on July 6, 1970, a new order was sent to the North Hollywood Postmaster which purported to limit the effect of the order to the particular seven magazines involved in the proceedings and specified that mail which appeared to be unconnected with the activity covered by the order should be delivered to appellee. (*Ibid.*, pp. 67-71).

On January 7, 1969, appellee filed a complaint for injunction and declaratory relief to restrain appellants from interfering with appellee's mail (A. 3). The com-

plaint alleged that appellee was engaged in distributing by mail publications, all of which were protected by the free speech and press provisions of the First Amendment. It was alleged that the order of the Judicial Officer was invalid and void because the findings that the magazines in question were obscene were unsupported by any legal evidence; were arbitrary, capricious, an abuse of discretion, and not in accordance with law; that the standards used by the Judicial Officer were contrary to those enunciated by the Supreme Court; that the conclusion of obscenity was contrary to law and unsupported by any legal evidence; and that the witnesses upon whom the Judicial Officer relied were not qualified (A. 5-6).

The complaint also alleged that the statute, 39 U.S.C. §4006, on its face and as construed and applied, violated rights guaranteed to appellee under the free speech and press, due process, equal protection, and jury trial provisions of the First, Fifth, Sixth and Seventh Amendments. It was alleged that the statute permitted the Post Office Department to impose a prior restraint upon the circulation of the press without assuring a judicial determination in an adversary hearing within a specified brief time limit. The statute, it was alleged, provides no assurance of prompt judicial determination, nor does the statute require the Post Office Department to initiate court proceedings and to bear the burden of proof in such court proceedings. It was further alleged that the statute arbitrarily and capriciously authorized an administrative agency to suppress material as obscene without the protection of a judicial proceeding, the right to a jury trial, requirement of proof of the essential elements of obscenity, including

scienter, and all the other protections required in a judicial proceeding.

The complaint further alleged that the statute, by reason of the vagueness and ambiguity of its language, lack of ascertainable standards, and omission of any requirement of *scienter*, vested unfettered discretion in the administrative agency to suppress speech and press as allegedly obscene. The statute permits the Post Office Department, it was alleged, to engage in invidious discrimination between material which the Department deems obscene for subjective reasons and other comparable material held constitutionally protected by the courts or granted second-class mailing privileges (A. 6-8). The complaint prayed for a declaration that the statute, on its face and as applied, for all the aforesaid reasons was unconstitutional, for injunctive relief, and for the convening of a three-judge court in accordance with 28 U.S.C. §§2282, 2284 (A. 8-10).

The matter came on for hearing before the three-judge court on April 10, 1969 (A. 19-20), and the memorandum opinion and order of the court was rendered on June 10, 1969 (A. 21-26). The court held that the statute authorized the Postmaster General, after an administrative hearing, to decide whether mailed matter was obscene and further authorized the Postmaster General to impose a mail block against the sender of such matter following the determination that the matter was obscene. The burden of seeking judicial review was placed on the person against whom the mail block had been imposed. The court held that the statute was unconstitutional on its face because it failed to meet the requirements of *Freedman v. Maryland*, 380 U.S. 51. In view of the ruling of the court,

the remaining contentions of the parties were not considered and the court did not pass upon the nature of the materials claimed to be the subject of the administrative hearing. The findings of fact and conclusions of law were filed August 1, 1969. (A. 23-26). The judgment requiring the appellants to vacate the order of the Judicial Officer and to deliver to appellee all mail was also filed on August 1, 1969. (A. 28-29). On August 13, 1969, appellants moved for a stay of the judgment pending appeal. (A. 31-39). On August 20, 1969, the district court made its order staying the judgment until September 10, 1969. (A. 41). On September 2, 1969, appellants filed their notice of appeal. (A. 43). On September 26, 1969, the district court stayed the judgment until it became final after appeal. (A. 45-48). Probable jurisdiction was noted by the Court on March 2, 1970. (A. 48).

Summary of Argument.

1. 39 U.S.C. §4006 is clearly unconstitutional on its face. The statute permits administrative censorship without any provision for judicial superintendence. The burden is placed upon the publisher or distributor of the publications to go to court, and no time limits are imposed between the administrative agency's first consideration of the material and final judicial determination.

Prior restraint in the form of administrative censorship under the statute is particularly obnoxious to the guarantee of freedom of speech and press under the circumstances herein. The publications found "obscene" by the administrative official were solicited by an employee of the Post Office Department. The letters

containing orders and remittances come plainly from persons willing to receive the publications. Despite all this, a judicial officer of the Post Office Department has made the decision that the material will not be sent through the mails to those who are willing to receive it. The constitutional standards and criteria enunciated in *Freedman v. Maryland* and *Rowan v. United States Post Office Department* are contravened by the statute.

2. The arguments of the government ignore modern history and current constitutional standards. The validity of an unfettered power of censorship by the Post Office Department has constantly been questioned by the courts and by the text writers. Reliance upon the older fraud cases like *Public Clearing House v. Coyne* and *Donaldson v. Read Magazine* is misplaced. We do not deal here with fraudulent schemes and devices or other unlawful conduct. We are concerned here with a governmental activity which directly affects the exercise of freedoms of speech and press. Congress may not restrict the circulation of any publication which is not obscene. The regulation of obscenity requires the most rigorous procedural safeguards to ensure the protection of freedom of expression.

The notion that Congress, in establishing a postal service, may annex such conditions to it as it chooses is no longer accepted judicial doctrine. A postal statute which affects expression must be tested against the demands of the First Amendment. In addition, the older fraud decisions do not reflect the developing constitutional standards affecting censorship of "obscenity". The teaching of the cases of the Court in the present era is that only a judicial determination

in an adversary proceeding ensures the necessary sensitivity to freedom of expression, and only a procedure requiring a judicial determination suffices to impose a valid final restraint.

39 U.S.C. §4006 permits censorship by an administrative official, without any judicial determination prior to or following final restraint. No procedural safeguards of any kind for the protection of nonobscene material are contained in the statute. The provisions of the statute are plainly overbroad, and the statute stands as a pervasive threat to the exercise of freedoms of speech and press inherent in its very existence.

3. The attempts by the government to distinguish *Freedman v. Maryland, Lamont v. Postmaster General,* and *Stanley v. Georgia* are fruitless. The very initiation of the adminstrative proceedings induces a self-censorship and restrictions upon the public's access to speech and press which the Post Office could not constitutionally suppress directly. The postal regulations governing hearings under §4006 do not provide for speedy determinations and, indeed, in the case herein, the time between the initiation of the administrative proceedings and the final departmental decision and order was two months. Moreover, neither the statute nor the regulations make any provision for judicial superintendence, either during the proceedings or subsequent to the rendition of the final order by the administrative official. The government frankly concedes that the "burden of seeking review is on the person subject to the order".

With respect to *Stanley v. Georgia,* the government admits that if the decision be read as holding that

consensual adult access to obscene materials is protected from governmental interference, then the use of the mails, which is inherently private and ordinarily consensual, is protected from government regulation. The government argues, however, that *Stanley* did not confer upon a willing person any right to receive obscene materials. It is submitted that the decision in *Stanley* emphasizes that the assertion of a governmental interest in dealing with the problem of obscenity cannot, in every context, be insulated from all constitutional protections. "Neither *Roth* nor any other decision of this court reaches that far." The Court in *Stanley* stated that freedom of speech and press necessarily protects the right to receive information and ideas, and that right includes the right to receive information and ideas regardless of their social worth. In *Stanley*, the Court could find no countervailing state interest justifying restriction of the fundamental right of an adult to receive alleged obscene material. The only evils which the State might have a right to prevent, the distribution of obscene material to minors or the distribution in such a manner as to evade the privacy or sensibilities of the general public, the Court held, are not present in the context of private consumption of ideas and information. Contrary to the government's position, there appears to be uniformity among the legal commentators in their view that the elimination of adult censorship has sound doctrinal support, is constitutionally required, and is socially desirable.

Additionally, the claim by the government that the statute does not offend the principles in *Lamont v. Postmaster General* also is tenuous. The interception of mail addressed to a publisher or distributor is con-

duct which touches basic freedoms. To compel a publisher or distributor to go to a designated Post Office, examine his mail in the presence of postal employees, and select that which is "not connected with the unlawful activity" is an unconstitutional abridgement of First Amendment rights. The statute here, which permits this type of detention, deprives not only the publisher and distributor of their constitutional rights, but also deprives the senders of the letters of similar rights.

4. It is plain that the government is unable to support the constitutional validity of §4006 in the light of the principles enunciated in *Freedman, Stanley, Lamont* and *Rowan*, the last decision being one left unmentioned in the government's brief. The government is therefore compelled to request the Court to rewrite the statute. The difficulty with the government's position in this regard is, first, the general considerations which militate against the assumption of legislative functions by the judiciary and, second, the fact that the suggested judicial amendment to the statute offered by the government will not cure the constitutional defects. The decisions in *Aptheker* and *Robel* indicate the Court's refusal to engage in judicial rewriting of overbroad statutes which impinge upon First Amendment rights.

5. The district court did not reach other contentions raised by appellee. The statute suffers from additional constitutional infirmities. Most significantly, the magazines here involved are clearly entitled to constitutional protection in the light of the decisions of the Court with respect to comparable material.

ARGUMENT.

I.

39 U.S.C. Section 4006, on Its Face and as Construed and Applied, Violates the Free Speech and Press, Due Process, Equal Protection, and Jury Provisions of the First, Fifth, Sixth and Seventh Amendments. The District Court Correctly Held That the Statute Conflicts With the Principles Enunciated by the Court in Freedman v. Maryland.

1. The statute, it is submitted, is clearly unconstitutional. Prior restraint here takes the form of administrative censorship, a system of restraint "peculiarly obnoxious to the guarantee of freedom of speech and press". Freund, The Supreme Court of the United States 66 (1961 ed.) The decision with respect to the suppression of the material is made by an official whose principal concern is a ban on the publications. The order of the Judicial Officer is the law, unless and until a person shoulders the burden of going to court to overturn it. Final restraint occurs before any judicial determination of the obscenity of the material has been made. No burden is placed upon the administrative agency to go to court, nor are any time limits imposed between the administrative agency's first consideration of the material and final judicial determination.

Moreover, prior restraint in the form of administrative censorship is particularly mischievous in the context of the circumstances herein. The publications found "obscene", as the record shows, were ordered and paid for by a willing adult. The letters containing orders and remittances for the publications come obviously from persons who are willing to receive them. It is an administrative official who stands "astride the

flow of mail", and who had decided by his own "evaluation of the material" that private choice by willing persons to receive the material shall be disregarded. It is not the householder who is the exclusive and final judge of what will cross his threshold; it is the Judicial Officer of the Post Office Department. In addition, the publisher and distributor of the publications are in effect denied circulation of the material through the mails, and the stigma of "Unlawful" is placed upon their publications.

The right of the public in a free society to unobstructed circulation of nonobscene publications is clearly abridged by 39 U.S.C. §4006. The standards and criteria enunciated in *Freedman v. Maryland*, 380 U.S. 51; *Stanley v. Georgia*, 394 U.S. 557; and *Rowan v. United States Post Office Department*, 90 S. Ct. 1484, are contravened by the statute herein involved.

2. The arguments of the government ignore modern history and current constitutional standards. The government concedes "that Congress' power of regulation over postal matters, as over commerce and tax, is limited by the stricture of the Bill of Rights". (Brief for Appellants, p. 17). It is urged, however, that just as Congress can authorize criminal prosecutions for using the mails to distribute obscene materials (citing *Roth* and 18 U.S.C. §1461), so too, Congress may authorize the administrative censorship here involved (citing *Kingsley Books, Inc. v. Brown, Ibid.*, p. 18). The government stresses the fraud statute (39 U.S.C. §4005), enacted in 1890, as the model for the statute here involved and points to *Public Clearing House v. Coyne*, 194 U.S. 497 (1904) and *Donaldson v. Read Magazine*,

333 U.S. 178 (1948) upholding the fraud statute. (*Ibid.*, pp. 5, 16-18).[1]

It should be observed that we are concerned here with a governmental activity which directly affects the exercise of freedoms of speech and press. Whatever may be the power of Congress to restrict the dissemination of "obscene" material, the fact is that under the First Amendment Congress may not restrict the circulation of any publication which is not obscene. *Smith v. California*, 361 U.S. 147, 152. It is therefore necessary, under such circumstances, for a legislature to supply "sensitive tools" for the evaluation of First Amendment claims. The operation and effect of the method by which speech is sought to be restrained "must be subjected to close analysis and critical judgment". *Speiser v. Randall*, 357 U.S. 513, 520. Regula-

[1]The constitutional validity of an unfettered power of censorship by the Post Office has constantly been questioned. "Not only is the federal interest in protecting the Nation against pornography attenuated, but the dangers of federal censorship in this field are far greater than anything the States may do." Justice Harlan in *Roth v. United States*, 354 U.S. at 505. See also, *Hannegan v. Esquire, Inc.*, 327 U.S. 146; Opinion of Justice Douglas in *Stanard v. Olesen*, 74 S. Ct. 768; Concurring Opinion of Justice Brennan, joined by Chief Justice Warren and Justice Douglas in *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 495-499; Paul and Schwartz, Federal Censorship: Obscenity in the Mail, Appendix I-3, pp. 252-263 (1961); Note, *Project: Post Office*, 41 So. Calif. L. Rev. 643-727 (1968). Indeed, in 1961, the then Postmaster ordered that all cases brought to enforce the obscenity laws be prosecuted through normal criminal procedures and all administrative and civil procedures be abandoned. The Postmaster stated: "It has been the policy of this Department under this Administration (since February 1961) to leave judging to the judges. It is the function of the administrator to direct to the attention of the criminal authorities those cases where the law may have been violated. When an administrator attempts to determine what constitutes obscenity, too often justice is entangled in a maze of administrative procedures, stopgap remedies, appeals, and delays. . . ." (Quoted in Konvitz, Expanding Remedies, 240-242 (1966).)

tions of obscenity must "scrupulously embody the most rigorous procedural safeguards . . . a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks". *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 66. See, Monaghan, *First Amendment "Due Process"*, 83 Harv. L. Rev. 518-551 (1970).

Cases like *Public Clearing House v. Coyne* and *Donaldson v. Read Magazine,* upon which the government so heavily relies, do not reflect current judicial attitudes. Both cases are premised on the notion that Congress, in establishing a postal service, may annex such conditions to it as it chooses. This notion has been described as "hoary dogma" which has "long since evaporated". See, Justice Harlan in *Roth v. United States,* 354 U.S. 476, 504, fn. 5; the dissenting opinions of Justices Holmes and Brandeis in *Leach v. Carlile,* 258 U.S. 138, 140-141; *United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson,* 255 U.S. 407, 427-428, 436-438; *Hannegan v. Esquire, Inc.,* 327 U.S. 146, 155-156; Note, *Unconstitutional Conditions,* 73 Harv. L. Rev. 1595, 1599-1602 (1960); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 Harv. L. Rev. 1439 (1968). The use of the mails today is not a privilege to which the Congress or the Post Office can attach any condition it chooses. The use of the mails is essential for many types of communications. When a postal statute affects expression, the exercise of the postal power must be tested against the demands of the First Amendment. ". . . the more recent decisions of the Supreme Court, has given the privilege doctrine the burial it merits." *Hiett v. United States,* 415 F. 2d 664, 668 (5 Cir. 1969), cert. den. 397 U.S. 936.

The *Public Clearing House* and *Donaldson* decisions, involving schemes to defraud and the use of the mails for the purpose of executing such fraudulent schemes, were also based upon the view that in such cases the lack of any provision for a judicial hearing on the question of illegality was not repugant to the due process clause of the Constitution. In relying upon these older decisions, the government again ignores the developing constitutional standards affecting the censorship of "obscenity". The procedural safeguards which have been designed by the Court to obviate the dangers of a censorship system have been based primarily on the guarantees of the First Amendment. "Thus, rather than attempting to apply the traditional requirements of due process to obscenity determinations, the Court has judged the adequacy of procedures by a different standard: does the procedure show 'the necessary sensitivity to freedom of expression?' " Monaghan, *First Amendment "Due Process"*, 83 Harv. L. Rev. at 518-519.

In *Freedman v. Maryland,* 380 U.S. 51, 58, the Court stated: "The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." Elimination of arbitrary and discriminatory use of restraint powers in the area of "obscenity" requires judicial superintendence prior to final restraint on speech and press. Only in this way can the regulation of obscenity avoid infringing on nonobscene materials. The protected nature of speech and press, under the Constitution, cannot be left to the final determination of an administrative agency.

The principles enunciated in *Bantam* and *Freedman* have been repeatedly affirmed by the Court and appellate and district courts in the federal juridiction. *Marcus v. Search Warrants of Property*, 367 U.S. 717; *Quantity of Copies of Books v. Kansas*, 378 U.S. 205; *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 181-182; *Dombrowski v. Pfister*, 380 U.S. 479, 494; *United States v. Robel*, 389 U.S. 258, 277-278. See also, *Tyrone, Inc. v. Wilkinson*, 410 F. 2d 639 (4 Cir. 1969) cert. den. 90 S. Ct. 477 *Bethview Amusement Corp. v. Cahn*, 416 F. 2d 410 (2 Cir. 1969) cert. den. 90 S. Ct. 929; *208 Cinema, Inc. v. Vergari*, 298 F. Supp. 1175 (D.C. N.Y. 1969), reversed in open court Oct. 9, 1969, ... F. 2d ...., (2 Cir.) Docket No. 33997, cert. den 90 S. Ct. 941; *Demich, Inc., et al. v. Ferdon, et al.*, 426 F. 2d 643 (9 Cir. 1970); *Cambist Films, Inc. v. Duggan*, 420 F. 2d 687 (3 Cir. 1969); *Metzger v. Pearcy*, 393 F. 2d 202 (7 Cir. 1968); *Potwora v. Dillon*, 386 F. 2d 74 (2 Cir. 1967); *United States v. Alexander*, ... F. 2d .... (8 Cir. May 22, 1970). The general proposition that a prior adversary judicial determination must be made before alleged obscene material may be suppressed has also been followed by a host of federal district courts. See, *Carroll v. City of Orlando*, 311 F. Supp. 967, 968 (D.C. Fla. 1970), for a listing of the numerous cases.[2]

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[2]The pragmatic reasons for requiring judicial determination in an adversary proceeding prior to restraint upon expression are multifold. Courts are more able consistently to understand and to apply the values embodied in the constitutional guarantees of freedom of speech and press on delicate questions of First Amendment freedoms than administrative officials. A court decision is likely to gain more public respect than a decision by an adminis-

(This footnote is continued on the next page)

It is therefore plain, it is submitted, in the light of constitutional requirements, that a statute which makes no provision for judicial superintendence in a procedure which censors and suppresses expression is constitutionally invalid. If such a statute, moreover, fails to provide for prompt judicial review of the administrative determination; if the burden is not placed by the statute upon the administrative official to go to court to prove that the material involved is unprotected expression, the burden resting on the administrative official to make such proof; if the restraint imposed in advance of final judicial determination is not limited to the shortest fixed period compatible with sound judicial resolution; and if the statutory procedure does not assure a prompt, final judicial decision, the statute must be deemed clearly violative of the guarantees of the First Amendment. *Freedman v. Maryland*, 380 U.S. 51, 57-60. See also, *Teitel Film Corp. v. Cusak*, 390 U.S. 139.

A statute dealing with the exercise of freedoms of expression which is completely devoid of the procedural safeguards necessary to protect such freedoms stands as a "pervasive threat inherent in its very existence" and sweeps within its ambit activities "that in ordinary circumstances constitute an exercise of freedom of speech

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trator who has been appointed because of his political affiliations. The long judicial tenure of judges may free them from direct political pressures which an administrator may not be able to resist. See, Monaghan, *First Amendment "Due Process"*, 83 Harv. L. Rev. at 522-524; 4 K. Davis, Administrative Law, §§30.06-30.09 (1958). Especially where questions of "constitutional judgment of the most sensitive and delicate kind" (*Roth v. United States*, 354 U.S. at 498) are involved, abnegation of judicial supervision would be inconsistent with the duty of the judiciary "to uphold the constitutional guarantees". (*Jacobellis v. Ohio*, 378 U.S. at 188).

or of the press . . . results in a continuous and pervasive restraint on all freedom of discussion that might be reasonably be regarded as within its purview." *Thornhill v. Alabama*, 310 U.S. 88, 97-98. See, Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844 (1970); Note, *The Chilling Effect in Constitutional Law*, 69 Colum. L. Rev. 808 (1969).

Measured by all the foregoing, 39 U.S.C. §4006 is unconstitutional on its face. The statute permits censorship by an administrative official, without any judicial determination prior to or following final restraint. No procedural safeguards of any kind for the protection of nonobscene material are contained in the statute. Reliance by the government on *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (Brief for Appellants, pp. 14, 18, 26 and 32) is misplaced, as the critical analysis of the Court in *Marcus v. Search Warrants*, 367 U.S. 717, 734-738, makes plain.

3. The attempts by the government to distinguish *Freedman v. Maryland*, *Lamont v. Postmaster General* and *Stanley v. Georgia* are unsupported. "Constitutional rights should not be frittered away by arguments so technical and unsubstantial". Justice Brandeis in *United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson*, 255 U.S. 407, 431.

The government contends that, unlike *Freedman*, there is no issue here "of prior censorship or restraint of publication". (Brief for Appellants, p. 22). The fact is, however, that the statute permits, initially, upon "evidence satisfactory to the Postmaster General", a determination that material being sent through the mail is "obscene" and that remittances are being obtained by the publisher or distributor for such alleged obscene

material. The regulations provide, and the case herein demonstrates, that the aforesaid determination is initially manifested by the filing of a complaint by the General Counsel of the Post Office Department and the issuance of a notice of hearing to the publisher or distributor concerned. 39 C.F.R. §§952.5, 952.7-952.8. A complaint which notifies a publisher or distributor that there is "probable cause to believe" that he is conducting an enterprise in violation of the federal statute; that he is obtaining remittances of money for "obscene" magazines and giving information where such matter can be obtained, and requesting the issuance of an order under the statute which will require all letters sent to the publisher or distributor to be returned and marked "Unlawful", can hardly fail to induce a self-censorship and restrictions upon the public's access to speech and press which the Post Office "could not constitutionally suppress directly". *Smith v. California*, 361 U.S. 147, 154.[8]

Following this initial inhibition upon the distribution of the material, the time for answer is fixed at

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[8]It is argued by the government that to forbid an initial determination of obscenity from being made by an administrative official would "raise grave doubts about the administrative process in many areas". (Brief for Appellants, p. 23). We do not deal here with the highly technical and complex subject matter in which such agencies as the National Labor Relations Board and Federal Communications Commission are generally involved. Such administrative agencies may have specialized expertise for dealing with the subject matter within their control. Whatever may be the expertise of the Postmaster General in the administration of the Post Office Department, it does not include a special competence to determine what constitutes obscenity under the standards and criteria enunciated by the Court and the application of such standards and criteria to the alleged "obscene" material. The determination of such questions is peculiarly for the courts, particularly in the light of the constitutional questions involved in every determination of "obscenity".

15 days and the hearing date is fixed at 30 days of the date of the notice of hearing, "whenever practicable". C.F.R. §952.7. The presiding officer at any hearing is either a Hearing Examiner or a Judicial Officer and the Rules of Evidence "covering civil proceeding in matters not involving trial by jury in the courts of the United States shall govern". C.F.R. §§952.17, 952.18. Not later than 5 days after the filing of the answer to the complaint, any party may file application for the taking of testimony by deposition. C.F.R. §952.21. Hearings are stenographically reported by a contract reporter of the Post Office Department. Within 10 days after the receipt by any party of the official transcript, he may file a motion requesting correction of the transcript. C.F.R. §952.22. Proposed findings of fact and conclusions of law must be filed within 15 days after the delivery of the official transcript. C.F.R. §952.23. A written "initial decision" shall be rendered "with all due speed". C.F.R. §952.24. Within 15 days from the receipt of the tentative decision, a party may file exceptions. C.F.R. §952.25. Briefs in support of exceptions to a tentative decision may be filed 10 days after receipt. C.F.R. §952.25. Within 10 days from the date of a final decision, either party may file a motion for reconsideration. C.F.R. §952.27. It is plain that the regulations do not provide for speedy determinations. In the case herein, the proceedings were initiated on November 1, 1968, and the departmental decision rendered on December 31, 1968, a period of two months.

Neither the statute nor the regulations make any provision for judicial superintendence, either during the procedings or subsequent to the rendition of the final

order by the administrative official. There is simply no burden placed upon the administrative agency to institute judicial proceedings; the order blocking the mail is immediately effective without any assurance of judicial review, let alone "prompt judicial determination". Indeed, we are told by the government: "It is true that, in the absence of an attempt to obtain judicial review, a Section 4006 order may take effect immediately, so that the burden of seeking review is on the person subject to the order". (Brief for Appellants, p. 24).

All that the government can suggest is that the publisher or distributor is "free to sell by other means", or if the publisher or distributor will assume the burden of going to court, then, suggests the government, "the necessary implication" is that the sales of the material are "merely postponed". In short, the government concedes that the statute makes no provision for initiation of judicial proceedings by the administrative agency, and the government continues to insist that the publisher or distributor must assume that burden. The suggestion that if such burden is assumed, the material will then only be "impounded" and not returned is a dubious act of grace which Congress did not provide, is not contained in the regulations, and which in no way avoids the constitutional infirmity of the statute under *Freedman*.[4]

The government states that if the publisher or distributor will assume the burden of going forward in a judicial proceeding and subject himself to the "im-

[4] "Impounding one's mail is plainly a 'sanction', for it may as effectively close down an establishment as the sheriff himself." Justice Douglas in *Stanard v. Olesen*, 74 S. Ct. 768, 771.

plied" impounding, then if the remitters become discouraged after a time of no response, "a publisher could explain the reason for delay to them if he ultimately prevailed, and thus retain their business". (Brief for Appellants, p. 25). After this statement, the government ventures the conclusion that "the publisher's burden on initiating judicial review is not so serious as to condemn the statute under the First Amendment". (*Ibid.*, pp. 25-26). Appellee submits that the government has in no meaningful way distinguished *Freedman*. The substance of the government's arguments is unfettered administrative censorship whthout judicial superintendence. Such contention, if sustained, would abridge seriously freedom of expression.[5]

With respect to *Stanley v. Georgia*, the government states that if the decision be read as holding that consensual adult access to obscene materials is protected from governmental interference, "then it might appear that use of the mails—inherently private and, in the case of a mailed order blank, ordinarily consensual —is indeed protected from government regulation". (Brief for Appellants, p. 19). The government also concedes that if *Stanley* be so read, that "consensual, noncommercial correspondence sent through the mail would

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[5]The government would not only place the burden upon the publisher or distributor to go to court, but would require such persons to carry the "burden of persuasion on judicial review". (Brief for Appellants, p. 26). In short, the publisher or distributor would have to bear the burden of persuasion to show that he did not engage in criminal speech. *Cf.*, *Freedman v. Maryland*, 380 U.S. at 58. Nothing in footnote 22 of *Interstate Circuit v. Dallas* (Brief for Appellants, p. 26) supports the government's position. The Dallas ordinance specifically provided "that the Board has the burden of going to court to seek a temporary injunction, once the exhibitor has indicated his nonacceptance, and there it has the burden of sustaining its classification". 390 U.S. 676, 690.

be found to enjoy immunity under *Stanley* from seizure or use as the basis for prosecution" (Brief for Appellants, p. 20), citing *Redmond v. United States*, 384 U.S. 264.

The government urges the arguments it has advanced in *Byrne v. Karalexis*, insisting that *Stanley* did not confer upon a willing person any right to receive obscene materials. It should be noted in this connection that the government brief leaves unmentioned *Rowan v. United States Post Office Department*, 90 S. Ct. 1484. The issues have been touched upon by counsel for appellee here in *Batchelor v. Stein*, October Term 1969, No. 565, Brief of Mel S. Friedman, Esq. and Stanley Fleishman, Esq. as Amici Curiae in Support of Appellee; *Byrne v. Karalexis*, October Term 1969, No. 1149, Motion for Leave to File Brief Amici Curiae, and Brief, on Behalf of National General Corp., *et al.* (See Addendum to Brief); *Grove Press v. Maryland State Board of Censors*, October Term 1970, No. 63, Motion for Leave to File Brief and Brief as Amicus Curiae for Adult Film Association of America, Inc.; *United States v. Thirty-Seven (37) Photographs*, October Term 1969, No 1475, Motion to Affirm; *United States v. Reidel*, October Term 1970, No. ....., Motion to Affirm.

Stanley held that the assertion of a governmental interest in dealing with the problem of obscenity cannot, in every context, be insulated from all constitutional protections. "Neither *Roth* nor any other decision of this court reaches that far." 394 U.S. at 564. The suggestion in *Roth* that obscenity is outside the area of First Amendment protection because utterly without social importance is rejected in *Stanley*. The

"right to receive information and ideas, regardless of their social worth, . . . is fundamental to our free society". 394 U.S. at 564. It is clear, stated the Court in *Stanley*, that freedom of speech and press necessarily protects the right to receive information and ideas. This right to receive information and ideas, regardless of their social worth, "is fundamental to our free society". 394 U.S. at 564. In *Stanley*, the Court could find no countervailing state interest justifying restriction of the aforesaid fundamental rights. The only evils which the State might have a right to prevent, the distribution of obscene material to minors or the distribution in such a manner as to invade the privacy or sensibilities of the general public, were not present in the context of private consumption of ideas and information. 394 U.S. at 565-567. In *Stanley*, the Court based its ruling upon prior decisions rendered by the Court in *Martin v. City of Struthers*, 319 U.S. 141; *Griswold v. Connecticut*, 381 U.S. 479; and *Lamont v. Postmaster General*, 381 U.S. 30. Those decisions make it clear that freedom of speech and press "embraces the right to distribute literature, . . . and necessarily protects the right to receive it . . . Freedom to distribute information to every citizen wherever he desires to receive it is . . . clearly vital to the preservation of a free society". 319 U.S. at 143-147. Under *Stanley* and *Rowan*, it is the adult citizen who is made the exclusive and final judge of what ideas, information or entertainment he will receive.

Contrary to the government's position, the legal commentators have virtually been uniform in their conclusion that the elimination of adult censorship by Stanley has sound doctrinal support; is constitutional-

ly required; and is socially desirable. The consensus is that *Stanley* has correctly focused the interest of the State upon minors and unwilling adults. Laughlin, *A Requiem for Requiems: The Supreme Court at the Bar of Reality*, 68 Mich. L. Rev. 1389-1408 (1970); Engdahl, *Requiem for Roth: Obscenity Doctrine is Changing*, 68 Mich. L. Rev. 185-236 (1969); Morreale, *Obscenity: An Analysis and Statutory Proposal*, 1969 Wis. L. Rev. 421-468; Note, *First Amendment: The New Metaphysics of the Law of Obscenity*, 57 Calif. L. Rev. 1257-1280 (1969); Ratner, *The Social Importance of Prurient Interest—Obscenity Regulation v. Thought-Privacy*, 42 So. Calif. L. Rev. 587-599 (1969); Karre, *Stanley v. Georgia: New Directions in Obscenity Regulation?*, 48 Tex. L. Rev. 646-660 (1970). See also, *United States v. Lethe*, 312 F. Supp. 421 (D.C. Calif. 1970).

With respect to the government's assertion that the mails here are being used for a commercial purpose and that "concern for the privacy of ideas is no longer appropriate" (Brief for Appellants, p. 20), it appears plain that the statement is erroneous on its face. We do deal here with protection of expression, with ideas, information and entertainment ordinarily protected by the First Amendment. That the appellee received remittances for its publications does not render the publications "commercial" in the First Amendment sense. *New York Times Co. v. Sullivan*, 376 U.S. 254, 265-266. Regulation of the use of the mails under the circumstances here presented is, therefore, as much forbidden under *Stanley* as would be other consensual correspondence sent through the mails. There is no difference in "degree of concern for the privacy of ideas" in either case (Brief for Appellants, pp. 19-20).

The claim by the government that the statute here does not offend the principles enunciated in *Lamont v. Postmaster General*, 381 U.S. 103, also appears tenuous. It is claimed that *Lamont* involved "mailing activities which were lawful", while the "trafficking in obscenity is not". (Brief for Appellants, p. 21). But in *Lamont*, the federal officials had condemned the literature as "communist political propaganda" (381 U.S. at 307) and the statute itself had defined communist political propaganda in the terms of the Foreign Agents Registration Act of 1938 (381 U.S. at 302-303). The government states that in *Lamont*, the addressee who requested delivery of the material had to bear "the stigma" of stating that he wished to receive documents classified as "communist political propaganda". On the other hand, the government argues that no comparable stigma is imposed by the requirement under §4006 that an addressee inspect his mail in the presence of Post Office officials for determination as to what is or is not "Unlawful".

The distinctions attempted to be drawn by the government are plainly without merit. The interception of mail addressed to a publisher or distributor containing orders for publications and remittances is conduct which "touches basic freedoms". *Stanard v. Olesen*, 74 S. Ct. at 771. Freedom of the press includes liberty of circulation and these freedoms are severely undermined if a publisher or distributor cannot receive orders or payment for his publications and, indeed, is further stigmatized by having all mail addressed to him sent back to his customers with the word "Unlawful" stamped on the outside of the envelope. Under such circumstances, to compel a publisher or distributor to

repair to a designated Post Office and examine his mail in the presence of postal employees, and to receive only that which is "not connected with the unlawful activity", is an unconstitutional abridgment of the publisher's or distributor's First Amendment rights. Moreover, it is submitted that the statute here involved, which permits the type of detention order made in this case, also deprives the senders of the letters of their constitutional rights and that appellee has the standing to vindicate the senders' rights. *NAACP v. Alabama*, 357 U.S. 449, 458-460.

4. The invalidity of the government's arguments is finally exemplified by the suggestion that since "the court might conclude that questions remain regarding the fact and timing of judicial involvement in its [the statute's] enforcement", then a "further limiting construction might be adopted which would meet these doubts and thus avoid invalidating the entire scheme". (Brief for Appellants, p. 26). In short, the government requests judicial rewriting. *Cf., Aptheker v. Secretary of State*, 378 U.S. 500; *United States v. Robel*, 389 U.S. 258. The difficulty with the government's position in this respect is, first, the general considerations which militate against the assumption of legislative functions by the judiciary and, second, the fact that the suggested judicial amendment to the statute will not cure the constitutional defects.

The suggestion of the government is that an appeal from a Section 4006 administrative order be treated "as staying it in its entirety until resolution of the appeal". (Brief for Appellants, pp. 26-27). The government argues that it would be appropriate to treat an appeal of a Section 4006 order "as automatically

staying its effect, where there was no Section 4007 judicial order for temporary detention of mail." (Brief for Appellants, p. 28). It is conceded by the government that the burden would still be on the publisher or distributor to go to court but, argues the government, "the initiative of filing an appeal from the administrative order is so slight that it could not invalidate the statutory scheme on First Amendment grounds". (Brief for Appellants, p. 28).

The Court has on a number of occasions indicated its opposition to judicial rewriting of overbroad statutes which impinge on First Amendment rights. The Court has been unwilling to usurp the legislative function, especially when, as in the case herein, the legislature has made it clear that it is opposed to the suggested judicial construction. Moreover, the Court has indicated that statutes which are presumptively unconstitutional, as in the case herein, and which are overbroad may still have a "chilling effect" even when judicially rewritten, since individuals will be generally aware only of the existence of the statute rather than any limiting construction. Finally, judicial rewriting is plainly inappropriate where the legislature has within its power "less drastic" means of achieving its objectives. Administrative censorship is the most obnoxious means of deciding the alleged unlawfulness of particular speech or press. "The clarity and preciseness of the provision in question make it impossible to narrow its indiscriminatory cast and overly broad scope without substantial rewriting". *Aptheker v. Secretary of State*, 378 U.S. at 515. "We are concerned solely with determining whether the statute before us has exceeded the bounds imposed by the Constitution when First Amendment

rights are at stake. The task of writing legislation which will stay within those bounds has been committed to Congress." *United States v. Robel*, 389 U.S. at 267. See also, Note, *Judicial Rewriting of Overbroad Statutes*, 57 Calif. L. Rev. 240-261 (1969).

In addition, the suggested construction by the government does not meet the constitutional standards and criteria enunciated in *Freedman*. Not only is the publisher or distributor still required to go to court and bear the burden of persuasion under the suggested construction, but there is still no provision for a brief time limit between the initiation of the administrative proceedings and the final judicial determination, and there is still no provision in the statute for any prompt, final judicial determination. When all of these factors are considered, together with the pending report to Congress of the President's Commission on Obscenity and Pornography, it is submitted that the attempt by the government to save the statute by its proposed judicial rewriting is unfounded. The only result would be to render the statute vague, uncertain and ambiguous, as well as overbroad.

5. In light of all the foregoing discussion, it is submitted that the district court correctly held that 39 U.S.C. §4006 is unconstitutional on its face. The district court did not reach other contentions raised by appellee. The statute permits the suppression of expression without the protections of a jury trial, without any requirements of proof of *scienter* or the essential elements of obscenity, and without any of the safeguards afforded in judicial proceedings involving publications ordinarily entitled to the protective guarantees of the First Amendment. See, Opinion of Justice Brennan in *Kingsley*

Books, Inc. v. Brown, 354 U.S. at 447-448; *Smith v. California*, 361 U.S. 147; *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58; *Speiser v. Randall*, 357 U.S. 513; *Memoirs v. Massachusetts*, 383 U.S. 413. Perhaps most significantly, the magazines here involved are clearly entitled to constitutional protection. *Bloss v. Dykema*, 90 S. Ct. 1727; *Carlos v. New York*, 90 S.Ct. 395; *Walker v. Ohio*, 90 S. Ct. 1884; *Henry v. Louisiana*, 392 U.S. 655; *Felton v. Pensacola*, 390 U.S. 340; *Conner v. City of Hammond*, 389 U.S. 48; *Central Magazine Sales, Ltd. v. United States*, 389 U.S. 50; *Potomac News Co. v. United States*, 389 U.S. 47; *Rosenbloom v. Virginia*, 388 U.S. 450; *Redrup v. New York*, 386 U.S. 767.[6]

Conclusion.

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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[6]The holding by the district court in *United States v. The Book Bin*, the companion case herein involving the validity of 39 U.S.C. §4007, cogently demonstrates, it is submitted, the constitutional invalidity of both §§4006 and 4007. (A. 96-105).